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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/522,322	03/16/2005	Christina Lutz	CU-4060 BWH	8831

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LADAS & PARRY LLP
224 SOUTH MICHIGAN AVENUE
SUITE 1600
CHICAGO, IL 60604

EXAMINER	
CHAWLA, JYOTI	
ART UNIT	PAPER NUMBER
1794	
MAIL DATE	DELIVERY MODE
08/19/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/522,322	LUTZ ET AL.	
	Examiner	Art Unit	
	JYOTI CHAWLA	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *17-32* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *17-32* is/are rejected.

7)☒ Claim(s) *30* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *3/14/2005*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Applicant's IDS submission of 3/14/2005 is acknowledged.
Claims 1-15 have been cancelled, claims 16-32 have been added. Claims 16-32 are pending and examined in the application.

Claim Objections

Claim 30 is objected to because of the following informalities: Line 2 of the claim as recited states "mixing dries herbs", which is incorrect, and should be replaced by "mixing dried herbs". Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 16-29 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
Claims 16-18 are indefinite for the recitation of "A confectionery article based on herbal mixtures ... comprising an extract of a mixture of herbs or a mixture of herb extracts and an extract of Stevia rebaudiana". As recited it is unclear whether the claim requires "an extract of a mixture of herbs" or "a mixture of herb extracts and an extract of Stevia rebaudiana" or any one of the three extracts or some other combination. Further, the claims 16-18 as recited are unclear whether the herbal extracts are liquids or solids or either. For the purposes of expediting the prosecution and examination, extracts of herbs in any form will be regarded as relevant prior art. Applicant is cautioned against the introduction of new matter to the originally-filed application.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(1) Claims 16-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Lifesavers (GB 1526 020).

Regarding claim 16-18 see the rejection under 35 USC 112 (second paragraph)
Regarding claims 16-20, lifesavers teaches chewable compressed tablet (page 1, lines 11-12), where the dry blend admixture of sweeteners and flavors is directly compressed (page 1, lines 48-50). The confection as taught comprises a mixture of herb extracts , such as, wintergreen, anise, clove, peppermint, thyme and sage (Page 1, line 95 to page 2, line 5), along with stevioside which is an extract of Stevia rebaudiana (Page 1, line 87), as instantly claimed.
Regarding claims 21-23, Lifesavers teaches addition of anise oil, i.e., extract from anise (Page 1, line 98), as instantly claimed.

Regarding claims 24-26, Lifesavers teaches of a chewable, pressed tablet, that is hard or solid (Page 1, lines11-12), as instantly claimed.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a

person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

(A) Claims 30-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lifesavers (GB 1526 020).

Regarding claims 30-32, Lifesavers teaches a method of producing a confectionery article comprising the steps of mixing the extract of herbs, with extract of Stevia rebaudiana and processing the resultant mixture into a confectionery article of the desired form (Page 1 and page 2, line 10). Regarding the steps of mixing dried herbs; extracting an extract from the mixture, it is noted that oils, such as peppermint, sage and anise as taught by Lifesavers reference are extracts. Further it is noted that extracts are conventionally known to be obtained from dried herbs as instantly claimed, thus Lifesavers teaches of the claimed step of obtaining the extract.

Regarding the thickening of the extract, as recited includes the recitation of term "if appropriate" which is considered to mean that the thickening step is optional and is treated as such.
Regarding the limitation of mixing herbs or the extract of at least one herb with extract of stevia or mixing the herbs and stevia to obtain an extract would have been a matter of routine determination for one of ordinary skill in the art at the time the invention was made. Dried herbs were known and available at the time of the invention. Extracts of herbs as recited were known and available at the time of the invention (Lifesavers). Thus, it would have been a matter of choice for one of ordinary skill at the time of the invention to use either the herb or the extract to make the confection, at least based on the cost and availability of the herbs or extracts. One would have been further motivated to use either herbs or their extracts based on the availability of time, e.g., addition of prepared extracts will shorten the production time.

(B) Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lifesavers in view of Bell et al (US 5338809), hereinafter Bell.
Lifesavers has been relied upon to reject claims 16-26 under 35 USC 102(b) as discussed above.
Regarding claim 27, Lifesavers is silent about the chewing confection being chewing gum. However, chewing gums with herbal extracts and stevia extracts were known at the time of the invention, as taught by Bell (column 4, lines 37-38 and 56-61). It would have been obvious for one of ordinary skill at the time of the invention to modify the teaching of Lifesavers and make a gum based confection with herb extracts including the extract of stevia, as taught by Bell. One would have been motivated to do so at least for the purpose of making the chewable confection of Lifesavers last longer and make it available in a form (i.e., gum form) that has been known to appeal to a wide range of consumers.

(C) Claims 28 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lifesavers in view of Zhao (US 2001/0002269 A1).

Lifesavers has been relied upon to reject claims 16-26 under 35 USC 102(b) as discussed above.

Regarding claim 28 and 29, Lifesavers is silent, however, herbal confections and beverages or beverage mixes containing herbs or extracts of herbs and extract of stevia were known at the time of the invention, as taught by Zhao (Abstract), where Zhao teaches a flavor composition with herb extracts of stevia and other herbs (application Publication [0027]). Zhao also teaches of multi phase foods including beverages and foods that can be added to liquids, such as carbonated foods, tea etc to make instant beverage as recited. Thus, beverages or instant beverage makers with stevia and herb extracts were known at the time of the invention. Therefore, one of ordinary skill in the art at the time of the invention would have been motivated to modify Lifesavers and make the herbal confection composition available in soluble or solid form. One would have been motivated to do so at least in order to make a confection such that it can be consumed as such or alternatively be added to foods or beverages to make herbal instant beverage, with the refreshing flavors of herbs. One would have been further motivated to do so to make a healthful herbal confection that is versatile and can either be consumed as a solid or drinkable confection, thereby enhancing the appeal of the herbal confection to more customers.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JC
Examiner
Art Unit 1794

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794